

Date of Decision: 25-1-96

and 5-2-96

Special Civil Applications No.342 and 10106 of 1995

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For Approval and Signature:

HONOURABLE MR. JUSTICE M.R. CALLA

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Special Civil Applications No.342 and 10106 of 1995

Mr. K.H.Bhaya, learned counsel for the petitioner in Special Civil Application No.342 of 1995 and for the respondent No.1 in Special Civil Application No.10106 of 1995.

Mr. A.S.Pandya, learned counsel for respondent No.1 i.e. Gujarat Labour Welfare Board in Special Civil Application No.342 of 1995 and for the petitioner i.e. Gujarat Labour Welfare Board in Special Civil Application No.10106 of 1995.

Mr. K.N.Shastri, learned counsel, for Mr. D.A.Bambhaniya, learned Addl.G.P. for respondents No.2 and 3 in Special Civil Application No.342 of 1995 and for respondent No.2 in Special Civil Application No.10106 of 1995.

COMMON ORAL JUDGMENT :

1. Both these matters involve the common question of law as to whether the Gujarat Labour Welfare Board is an establishment so as to invoke the Payment of Gratuity Act, 1972 by the employees of the Board for the purpose of the payment of the gratuity and, therefore, both the matters are decided by this common judgment and order.

2. Facts relating to Special Civil Application No.342 of 1995 :

Petitioner herein was working as a part time worker with the Gujarat Labour Welfare Board and she retired after serving for a period of nearly 31 years and 7 months on 31-1-93. The Gujarat Labour Welfare Board refused to pay the gratuity on petitioner's retirement by saying that she was not entitled to any gratuity. The petitioner, therefore, applied before the Controlling Authority under the Payment of Gratuity Act vide Application No.178 of 1993 on 27-4-93. The Controlling Authority allowed the petitioner's application on 20-8-93 and directed the payment of Rs.8941.95 Ps. to her against the due amount of gratuity. Against this order dated 20-8-93 passed by the Controlling Authority, the Gujarat Labour Welfare Board preferred an Appeal before the Appellate Authority at Ahmedabad under the Payment of Gratuity Act. The Appellate Authority allowed the Appeal on 21-4-94 and set aside the order passed by the Controlling Authority. Against this order dated 21-4-94 passed by the Appellate Authority at Ahmedabad the present Special Civil Application was filed on 17-1-95 before this Court.

No return has been filed on behalf of the respondents No.2 and 3. But Mr. Pandya appearing on behalf of Gujarat Labour Welfare Board -respondent No.1 has filed an affidavit -in- reply dated 6-3-95 today and a copy thereof has been made available to Mr. Bhaya, the learned counsel for the petitioner.

3. Facts relating to Special Civil Application No.10106 of 1995:

This Special Civil Application has been filed by the Welfare Commissioner, Gujarat Labour Welfare Board against the order dated 11-9-95 passed by the Appellate Authority in Appeal No.26 of 1995 whereby the Appeal of

D.M.Bhatt-employee of the Gujarat Labour Welfare Board was allowed. D.M.Bhatt had retired from the service of the Gujarat Labour Welfare Board on 31-10-93 and whereas the gratuity was not paid to him, he had preferred an Application No.56 of 1994 before the Controlling Authority under the Payment of Gratuity Act. The Controlling Authority under the Payment of Gratuity Act at Rajkot passed an order on 24-3-95 rejecting the application of D.M.Bhatt-respondent No.1. Against this order dated 24-3-95 D.M.Bhatt preferred an Appeal before the Appellate Authority under the Payment of Gratuity Act and the Appellate Authority allowed the Appeal of D.M.Bhatt against the Gujarat Labour Welfare Board and directed that the payment of Rs.32900/- be made to D.M.Bhatt against the gratuity. Against this order dated 11-9-95 passed by the Appellate Authority under the Payment of Gratuity Act at Rajkot this Special Civil Application was preferred on 29-11-95 by the Gujarat Labour Welfare Board.

No return has been filed on behalf of any of the respondents.

4. Having narrated the facts of both the cases as above I find that the Appellate Authorities at Ahmedabad and Rajkot have taken different and contradictory views on the question as to whether the employees of Gujarat Labour Welfare Board are entitled to gratuity under the Payment of Gratuity Act or not. Mr.Bhaya appearing on behalf of the employees has argued that the Gujarat Labour Welfare Board is an establishment within the meaning of the law in force in relation to establishments in the State of Gujarat under S.1(3)(b) of the Payment of Gratuity Act, 1972 and the petitioner Jayaben, even if a part time employee, is covered by the definition of employee under S.2(e) of the Payment of Gratuity Act,1972 and is entitled to the payment of Gratuity under S.4, payment thereof was wrongly denied by the Board and the Appellate Authority under the Payment of Gratuity Act at Ahmedabad in case of Jayaben-the petitioner in Special Civil Application No.342 of 1995 wrongly rejected her Appeal. Mr.Bhaya on behalf of petitioner Jayaben has submitted that she was getting a fixed pay of less than Rs.2500/- per month so as to be covered by the definition of employee under S.2(e) and had completed more than 5 years of service so as to be entitled to the gratuity under S.4 and more than ten persons were employed in the Gujarat Labour Welfare Board. On behalf of D.M.Bhatt-respondent No.1 in the Special Civil Application No.10106 of 1995 also it has been submitted

that he had served the Board since 1962 and had retired from the service on 31-10-93 and his pay was also less than Rs.2500/- per month and he was fully covered by the definition of employee under S.2(e) of the Payment of Gratuity Act and having served for more than 5 years, he was entitled to the payment of gratuity under S.4 and the Appellate Authority under the Payment of Gratuity Act at Rajkot had rightly allowed his Appeal directing the payment of a sum of Rs.32,900/- against gratuity.

5. Mr. A.S.Pandya has vehemently contested the claim of the petitioner in Special Civil Application No.342 of 1995 and that of the respondent No.1 in Special Civil Application No.10106 of 1995. His argument is that the Gujarat Labour Welfare Board is not an establishment within the meaning of S.1(3)(b) of the Payment of Gratuity Act, 1972. Mr.Pandya has submitted that Gujarat Labour Welfare Board is a statutory body under the Bombay Labour Welfare Fund Act, 1953, which is adopted by the State of Gujarat and it has been so constituted under S.4 of the Bombay Labour Welfare Fund Act, 1953. He has taken me through the preamble of the Bombay Labour Welfare Fund Act, 1953 as also S.3, S.7 and S.19 of the said Act and has submitted that this Act was enacted to promote the welfare of the labour in the State of Gujarat and for conducting such activities and the Gujartat Labour Welfare Board constituted under S.4 of the Act deals with the fund called 'Labour Welfare Fund'. Under S.3, the fund vests in and is held and applied by the Board as Trustees subject to the provisions of and for the purpose of this Act. The funds are to be utilized by the Board to defray expenditures on community and social education centres, including reading rooms and libraries, community necessities, games and sports, excursions, tours and holiday homes, entertainment and other forms of recreation, home industries and subsidiary occupations for women and unemployed persons, corporate activities of social nature, cost of administering the Act- including the salaries and allowances of the staff appointed for the purpose of this Act and such other objects as would in the opinion of the State Government improve the standard of living and ameliorate the social conditions of labour. Rule 19B of the Labour Welfare Fund (Gujarat) Rules, 1962 framed by the State Government in exercise of the powers under S.19 of the Bombay Labour Welfare Fund Act, 1953 provides for the conditions of service of the welfare Commissioner and other staff and accordingly the provisions of Bombay Civil Services Rules (Except Chapter XI thereof), as amended from time to time by the Government of Gujarat, are applicable to the Welfare Commissioner and other staff appointed under the Act.

Mr. Pandya appearing for the Gujarat Labour Welfare Board has also invited my attention to the three letters dated 8-10-90, 10-3-92 and 20-6-93 sent by the Labour and Employment Department of the Government of Gujarat to the Welfare Commissioner of the Gujarat Labour Welfare Board and it has been argued that the Government is of the view that the payment of gratuity Act is not applicable to the employees of the Gujarat Labour Welfare Board and that if at all the benefit of the gratuity is to be availed, appropriate proposals be made after making amendment in the Gratuity Rules applicable to the Board. Mr. Pandya has developed his argument that the Board is not an establishment on the basis of the provisions as aforesaid and he has contended that the Board is not covered by the words "commercial establishment" or "establishment" within the meaning of S.2(4) and S.2(8) of the Bombay Shops and Establishment Act, 1948. According to him no organisation can be held to be an "establishment" under S.1(3)(b) of the Payment of Gratuity Act, 1972 unless it is an establishment under the Bombay Shops and Establishments Act, 1948, which is in force in the State and it has also been submitted by him that the use of the word "and" in S.1(3)(b) between "shops" and "establishment" is conjunctive and not disjunctive and, therefore, such establishment must be an establishment within the meaning of any law for the time being in force in relation to Shops as well as Establishments and the words "shops" and "establishments" cannot be read disjunctively. Once it is found that the Gujarat Labour Welfare Board is not an establishment within the meaning of the law for the time being in force in relation to shops and establishments in the State of Gujarat, there is no question of applying the provisions of the Payment of Gratuity Act, 1972 and the employees of the Gujarat Labour Welfare Board can claim gratuity only in accordance with the Gratuity Rules, which are applicable to the Board and if there is no entitlement to the gratuity under such Rules, the claim of the employees for gratuity under the Payment of Gratuity Act, 1972 can not be sustained.

6. On the other hand it has been argued by Mr. Bhaya on behalf of the employees of the Gujarat Labour Welfare Board that firstly the Board is an establishment within the meaning of 'commercial establishment' under S.2(4) of the Bombay Shops and Establishments Act, 1948 and in the alternative it has been argued by him that an 'establishment' may be covered under any law, not necessarily the law in force in a particular State in relation to Shops and Establishments only. He has submitted that the scope of S.1(3)(b) is wide enough to

take within its sweep any establishment under any law and not necessarily the law in relation to the Shops and Establishments only and according to him the use of the word 'and' between 'shops' and 'establishments' is disjunctive and not conjunctive. Mr. Bhaya has further argued that the Gujarat Labour Welfare Board is an establishment not only with reference to the provisions of the Bombay Shops and Establishments Act, 1948, but it is an establishment under several laws, which are in force in the State of Gujarat, whether they are Central Act or a State Act and to support his argument he has referred to the provisions of the Contract Labour (Regulation & Abolition) Act, 1948, Employment Exchange (Compulsory Notification of Vacancies) Act, Industrial Disputes Act, 1947 and Apprenticeship Act and has submitted that even if such laws are Central Laws, they are in force in the State of Gujarat also. According to him, it is not necessary that the law in force in the State means only the State laws and not the Central laws and, therefore, if any establishment is an establishment within the meaning of any law in force in the State notwithstanding the distinction of State or Central Act, it has to be taken to be an establishment within the meaning of S.1(3)(b) of the Payment of Gratuity Act, 1972 and the basis on which the claim of the employee has been turned down by the Appellate Authority under the Payment of Gratuity Act at Ahmedabad is absolutely wrong and misconceived and the claim, which had been accepted by the Appellate Authority under the Payment of Gratuity Act at Rajkot, is absolutely well founded. He thus seeks to assail the order passed by the Appellate Authority at Ahmedabad against the employee and seeks to defend the order passed by the Appellate Authority at Rajkot, which are impugned orders in Special Civil Application No.342 of 1995 and Special Civil Application No.10106 of 1995 respectively. Mr. Bhaya has placed strong reliance on the following decisions:

1. 1981(1) LLJ 354 (State of Punjab v. Labour Court, Jullundur) a decision of the Supreme Court.
2. 1985 (2) LLJ 63 (Regional Provident Fund v. Regional Labour Commissioner) a decision of Karnataka High Court.
3. 1986(1) LLJ 323 (Municipal Corporation of Delhi v. V.T. Naresh and another) a decision of Delhi High Court.
4. 1986(2) GLR 983 (Ahmedabad Panjarapole v.

Mazdoor Sabha) a Division Bench decision of Gujarat High Court.

5. 1993 (2) LLJ 487 (Poona Contonment Board v. S.K.Das and others)

Mr. Bhaya on behalf of the employees has also referred to S.14 of the Payment of Gratuity Act, 1972 and has submitted that the provisions of the Payment of Gratuity Act, 1972 have an overriding effect over any enactment and, therefore, the argument advanced on behalf of the Board that the claim of the gratuity can be sustained only with reference to Gratuity Rules, as are applicable to the Board, is not tenable.

7. Before I proceed to examine the submissions, which have been made at the Bar on behalf of both the sides, the relevant provisions of law, which are required to be considered, may be reproduced :

S.1(3)(b) of the Payment of Gratuity Act, 1972

"1(3)(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;"

S.14 of the Payment of Gratuity Act, 1972

"14. Act to override other enactments,etc.- The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

S.2(4) and S.2(8) of the Bombay Shops and Establishments Act, 1948

"2.(4) "Commercial establishment" means an establishment which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes a

society registered under the Societies Registration Act, 1860 and a charitable or other trust, whether registered or not, which carries on whether for purposes of gain or not, any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;"

"s(8) "Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the State Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act;"

#### S.7 of the Bombay Labour Welfare Fund Act, 1953

"7(1) The fund shall vest in and be held and applied by the Board as Trustees subject to the provisions and for the purposes of this Act. The moneys therein shall be utilised by the Board to defray the cost of carrying out measures which may be specified by the State Government from time to time to promote the welfare of labour and of their dependents.

(2) Without prejudice to the generality of sub-section (1) the moneys in the Fund may be utilized by the Board to defray expenditure on the following :

(a) community and social education centres including reading rooms and libraries;

(b) community necessities;

(c) games and sports;

(d) excursions, tours and holiday homes;

(e) entertainment and other forms of recreations;

(f) home industries and subsidiary occupations for women and unemployed persons;

(g) corporate activities of a social nature;

(h) cost of administering the Act including the salaries and allowances of the staff appointed for the purposes of the Act; and

(i) such other objects as would in the opinion of the State Government improve the standard of living and ameliorate the social conditions of labour:

Provided that the Fund shall not be utilized in financing any measure which the employer is required under any law for the time being in force to carry out:

Provided further that unpaid accumulations and fines shall be paid to the Board and be expended by it under this Act notwithstanding anything contained in the Payment of Wages Act, 1936, or any other law for the time being in force.

(3) The Board may, with the approval of the State Government, make a grant of the Fund to any employer, any local authority or any other body in aid of any activity for the welfare of labour approved by the State Government.

(4) If any question arises whether any particular expenditure is or is not debitable to the Fund, the matter shall be referred to the State Government and the decision given, by the State Government shall be final.

(5) It shall be lawful for the Board to continue any activity financed from the labour welfare fund of any establishment, if the said fund is duly transferred to the Board."

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8. The basic facts in both the matters are not in dispute. The only question which requires consideration is as to whether the Gujarat Labour Welfare Board is an establishment within the meaning of S.1(3)(b) of the Payment of Gratuity Act, 1972. Whereas it is clear from definition of the 'employee' given in S.2(e) of the Payment of Gratuity Act, 1972 and the conditions mentioned in S.4 of the Payment of Gratuity Act, 1972 are admittedly satisfied factually in case of the employees in both these matters, in case it is found that the Gujarat Labour Welfare Board is an 'establishment' within

the meaning of S.1(3)(b), there can not be any difficulty in upholding the claim to the entitlement of the gratuity with regard to the employees of the Gujarat Labour Welfare Board.

9. There is no dispute that the Gujarat Labour Welfare Board has been constituted under the Bombay Labour Welfare Fund Act, 1953 and according to the provisions of S.7 this Board holds the welfare fund and the same is held by the Board as Trustees, the fund also vests in the Board. In this view of the matter, the Gujarat Labour Welfare Board may be a Trust as mentioned in sub-section (2) of S.2 of the Bombay Shops and Establishments Act, 1948 dealing with the definition of 'commercial establishment'. The Gujarat Labour Welfare Board as a Trustee of the fund under the Bombay Labour Welfare Fund Act, 1953, whether registered or not, carries on work in connection with or incidental or ancillary there to whether for purposes of gain or not and as such it appears that the Gujarat Labour Welfare Board is covered under the definition of 'commercial establishment' as mentioned under S.2(4) of the Bombay Shops and Establishments Act, 1948. In the alternative, even if it is assumed that the Gujarat Labour Welfare Board is not covered by the definition of 'commercial establishment' as given in S.2(4) of the Bombay Shops and Establishments Act, 1948, it is still an establishment within the meaning of S.1(3)(b) of the Payment of Gratuity Act because it is an establishment within the meaning of the law which is in force in relation to 'establishment' in the State of Gujarat. It is not in dispute that various Central Acts, which have been enumerated in para 8 in the earlier part of the Judgment as pointed out by Mr.Bhaya, viz Contract Labour (Regulation & Abolition) Act, 1948, Employment Exchange (Compulsory Notification of Vacancies) Act, Industrial Disputes Act, 1947 and Apprenticeship Act are in force in the State of Gujarat and that being so, it is an 'establishment' within the meaning of the law for the time being in force in the State of Gujarat and it is not in dispute that more than ten persons are employed in this Board. The use of the word 'and' between the words 'shops' and 'establishments' is clearly disjunctive and and it can not be read to be conjunctive and, therefore, it is not necessary that such establishment must be in relation to shops as well as establishments. It can be 'shops' and distinctly it can be an 'establishment' and yet it would be covered under S.1(3)(b) of the Payment of Gratuity Act, 1972. In State of Punjab v. Labour Court, Jullundur (Supra) the Supreme Court was dealing with a case with reference to the Punjab Shops and

Establishments Act and it has been observed that besides shops it relates to commercial establishments also. While referring to the provisions of S.1(3)(b) of the Payment of Gratuity Act, the Supreme Court has observed that had the intention of the Parliament been while enacting S.1(3)(b) to refer to a law relating to commercial establishments, it would not have left the expression 'establishments' unqualified. It also observed that it was difficult to accept the contention that the law referred to under S.1(3)(b) must be a law relating to both the shops and establishments such as the Punjab Shops and Commercial Establishments Act because the Supreme Court found that there is no warrant to limit the meaning of the expression 'law' in S.1(3)(b) and further that the expression is comprehensive in its scope and it can mean a law in relation to shops as well as separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. In view of such a categorical pronouncement by the Apex Court, it is not discernible by any reasoning to give a limited meaning to S.1(3)(b) as has been argued by Mr.Pandya and I have no hesitation in holding that S.1(3)(b) of the Payment of Gratuity Act applies to every establishment within the meaning of any law for the time being in force in relation to establishment in a State and such an establishment would also include an establishment like Gujarat Labour Welfare Board for the purpose of payment of the gratuity and the Payment of Gratuity Act applies to the Gujarat Labour Welfare Board with full force and the payment of the gratuity could not be denied to the employees of the Gujarat Labour Welfare Board on the ground that Gujarat Labour Welfare Board is not an establishment within the meaning of S.1(3)(b) of the Payment of Gratuity Act. In view of the authoritative pronouncement of the Supreme Court in the case of State of Punjab v. Labour Court, Jullundur, which applies on all force, I need not deal with in detail with the other cases cited by Mr.Bhaya viz Municipal Corporation of Delhi v. V.T. Naresh and another (Supra) wherein it has been held by the Delhi High Court that local authority created under the Delhi Municipal Corporations Act is an establishment governed by the Gratuity Act, Ahmedabad Panjarapole v. Mazdoor Sabha (Supra) wherein the Public Trust or a Charitable Institution like the Panjarapole has been held to be a commercial establishment by the Gujarat High Court and Poona Contonment Board v. S.K. Das and others (Supra), a decision of the Bombay High Court, wherein it has been held that S.1(3)(b) of Payment of Gratuity Act applies to an establishment within the meaning of any law for the

time being in force in relation to shops and establishments and it is not necessary that State law must apply to the establishment in question.

10. The other arguments raised by Mr. Pandya are that the employees of the Gujarat Labour Welfare Board are governed by the Labour Welfare Fund (Gujarat) Rules, 1962 and conditions of the service of the staff of the Board are governed by the provisions of the Bombay Civil Services Rules. With reference to the three letters dated 8-10-90, 10-3-92 and 20-6-93 sent by the Labour and Employment Department of the Government of Gujarat to the Welfare Comissioner of the Gujarat Labour Welfare Board, he has argued that the Government is of the view that the Payment of Gratuity Act is not applicable to the employees of the Gujarat Labour Wlefare Board unless appropriate amendments are made in the Gratuity Rules applicable to the employees of the Board. Suffice it would be to mention that S.14 of the Payment of Gratuity Act has an over riding effect over all other existing laws and the absence of provisions relating to the payment of gratuity in the Rules, which are locally made applicable, can not create any impediment against the right of receiving gratuity under the Payment of Gratuity Act, 1972. High Court of Karnataka has also taken the same view with reference to the provisions of S.14 in the case of Regional Provident Fund v. Regional Labour Commissioner (Supra) and has held that the provisions of Gratuity Act have an over riding effect over the Service Regulations providing for non-payment of gratuity. Even otherwise, the provisions of S.14, which have been enumerated in the earlier part of this order, make it clear that the provisions of the Payment of Gratuity Act or any Rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act. In this view of the matter, the absence of the provisions relating to the payment of gratuity in the Rules, which are locally made applicable, can not come in the way of the right to receive gratuity and the suggestion that appropriate proposals be made after making amendment in the Gratuity Rules applicable to the Board is irrelevant and wholly misplaced.

11. The upshot of the aforesaid discussion is that the petition filed by Smt. Jayaben Suryakant Modi i.e. Special Civil Application No.342 of 1995 succeeds and the petition filed by the Welfare Comissioner of the Gujarat Labour Welfare Board i.e. Special Civil Application No.10106 of 1995 fails. Consequently the order passed by

the Appellate Authority under the Payment of Gratuity Act at Ahmedabad assailed in Special Civil Application No.342 of 1995 is hereby quashed and set aside and the order passed by the Controlling Authority under the Payment of Gratuity Act in favour of the petitioner Smt. Jayaben Suryakant Modi is hereby restored. The order passed by the Appellate Authority under the Payment of Gratuity Act at Rajkot in favour of Shri D.M.Bhatt and against the Gujarat Labour Welfare Board is upheld in Special Civil Application No.10106 of 1995.

The payment of gratuity had become due in favour of the petitioner Smt. Jayaben Suryakant Modi from 31-1-93 and in case of Shri D.M. Bhatt from 31-10-93 and both these employees have not been paid the gratuity as per the provisions of Payment of Gratuity Act, 1972 and, therefore, I deem it to be a proper case to direct the payment of interest at the rate of 12 per cent per annum to each of the two employees from the date it became due. It is expected that now the gratuity shall be paid to the employees in both the cases within a period of six weeks from the date the writ is served upon the Board and should the Board still fail to make the payment of gratuity to the employees i.e. petitioner in Special Civil Application No.342 of 1995 and respondent No.1 in Special Civil Application No. 10106 of 1995, both these employees shall be entitled to 18 per cent interest per annum after the expiry of six weeks.

Accordingly Rule in Special Civil Application No.342 of 1995 is hereby made absolute with no order as to costs and the Rule in Special Civil Application No.10106 of 1995 is hereby discharged with no order as to costs.